

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1323

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
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Plaintiff-Appellee, :
:
-against- :
:
ROTHWELL REDDICK, :
:
Defendant-Appellant. :
:
-----X

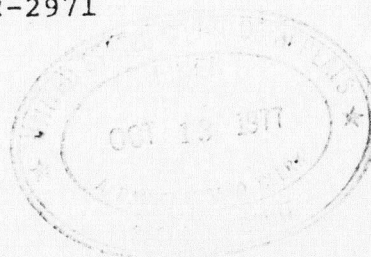
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Docket No. 77-1323

BRIEF FOR APPELLANT
ROTHWELL REDDICK

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Question Presented

Whether appellant was deprived of a fair trial by the
prosecutor's improper remarks in summation.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District
Court for the Southern District of New York (The Honorable Marvin
E. Frankel) rendered on July 27, 1977, after a trial before a

jury, convicting appellant of one count of possession of stolen mail (18 U.S.C. §1708). Appellant was sentenced to a term of five years; pursuant to 18 U.S.C. §3651 he was ordered confined for five months in a jail-type institution, the execution of the remainder of the sentence was suspended and appellant was placed on probation for a period of two years.

By order of this Court, dated August 3, 1977, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Reddick was charged in a single-count indictment* with the unlawful possession of a check-letter addressed to one J.A. Guischart which had been stolen from the mail (18 U.S.C. §1708). The only issue at trial was whether appellant knew that the check was stolen.

A. The Government's Case

During February 1977, appellant appeared at the home of Ms. Walta Buttone with a sealed envelope containing her unemployment check, which was addressed to "W.J. Buttone." Appellant asked for "Willie Joe," explaining that someone by that name had played \$35 worth of numbers with him and had left the check as collateral. When Willie failed to appear with the money,

*The indictment is B to the separate appendix to appellant's brief.

appellant had gone to the address on the envelope (27-28, 30).* Ms. Buttone did not tell appellant that no one named Willie Joe resided with her (37), but merely asked him to come back at a later time. Appellant refused because he had already made several trips and spent money for gas and would not hand over the check unless she paid him \$35 (28, 30-31). Appellant handed her the envelope through the door, which was chained throughout the conversation, and Ms. Buttone then gave him the money (42, 32).

On February 8, 1977, James Guischarde learned from several neighbors that a man had been looking for him with his unemployment check.** The man wanted \$20 for the check, which had been left as collateral in a numbers game (49-50), and left a note with the name "Robert" and appellant's home phone number*** (51, 64, 94, 157). That afternoon, appellant arrived and told Guischarde that he would have to pay \$20, the amount of appellant's loss, to obtain his check (53, 84). Guischarde called the postal inspectors, to whom he had earlier reported the incident, and appellant was arrested outside the complainant's door with the sealed envelope (containing the notation "\$20 credit") in his hand (51, 54, 58, 62, 92).

Appellant was questioned about the Guischarde check and his oral and written statements made no mention of the Buttone

*Numerals refer to the transcript of the trial and sentencing.

**The defense stipulated that the check had been addressed to Guischarde and placed in the mail (138-139).

***Guischarde dialed the number several times, but no one answered (77).

check (112, 133). He asserted his innocence, claiming that he had thought the check belonged to his acquaintance, "James," who had borrowed \$20 to play the numbers (132-133). Among the documents found in appellant's possession were a recent bill with Ms. Buttone's last name and address and several press cards, one unsigned and the other with the signature of William J. Buttone; appellant allegedly said he used the cards to get into public events (109-112).*

B. The Defense

Appellant, a 25 year old married man who worked at various occupations and had two children, testified in his own defense. He had previous convictions for possession of a loaded weapon, attempted forgery in the second degree and possession of stolen postal money orders (178, 189, 226-227). Appellant's account was basically consistent with his previous statements to the postal inspector, Mr. Guischarde and Ms. Buttone. However, he added that James and Willie (or "Shot")** had given him the press card and several bills in addition to their checks (147-150), and that two non-English speaking Hispanics -- Rio and Angelo -- had been present at the transaction (152-153). Appellant, who used the nickname "Robert" (157-158), denied that he had told either Buttone or Guischarde that he would not hand over their check

*There was no notation of this remark (114-115) and appellant denied making it (176).

**At Ms. Buttone's apartment, appellant had asked for Willie "Shot," not "Joe" as she had testified (161-162).

unless they paid him a sum of money (164, 170).*

C. . The Prosecutor's Summation

The prosecutor began her summation by arguing:

Ladies and gentlemen of the jury, you have been given a rare opportunity to see Rothwell Reddick in action. He is a con artist, and you have seen him trying to con you into believing his story.

(234).

See also, 244, again characterizing appellant as a "con man." She later referred to him as a "streetwise guy," who told a "terrific story, so unbelievable you could hardly come up with anything better" (240).

Near the close of her rebuttal, the prosecutor told the jury, "Rothwell Reddick was faced with the evidence against him and he has tried to get out of it" (276). She further stated:

You won't be taken in by that story of his. It is simply too much to swallow. He is a con artist, but a combination of a smart and stupid one at the same time. He tries to seem legitimate when he shows up with that check, but he flubs it and now he is trying a scam right here on you in the courtroom.

You will convict him because in February he had Mr. Guischarde's check in his possession, a check which had been stolen

*Ms. Buttone, he asserted, had paid not \$35, but \$25, for appellant had apportioned the \$45 debt between James and Willie (167, 151).

from the mails and a check which he knew was stolen, and he want [sic] to make money off that check.

(276).

D. Verdict and Sentence

The jury began deliberating* at 11:03 a.m. of June 23 and reached a verdict of guilty 24 hours later (306, 323). The jury announced a deadlock at one point and later asked whether it could make a recommendation with its verdict (310-312, 319-323).

The court sentenced appellant to a term of five years; pursuant to 18 U.S.C. §3651 he was ordered confined for five months in a jail-type institution, the execution of the remainder of the sentence was suspended and appellant was placed on probation for a period of two years (343-344).

*The complete charge is C to the separate appendix to appellant's brief.

ARGUMENT

POINT I

APPELLANT WAS DEPRIVED OF A FAIR
TRIAL BY THE PROSECUTOR'S IMPROPER
REMARKS IN SUMMATION.

This was a close case involving a simple question of credibility of the witnesses, where the jury could not reach a verdict for 24 hours. During their deliberations, the jurors sent one note announcing that they were unable to reach an agreement and another asking whether they could make a recommendation along with the verdict. Under these circumstances, the prosecutor's repeated argument by inflammatory epithets and assertions of her personal belief as to appellant's guilt must be deemed prejudicial.

From the beginning of her summation until the conclusion of her rebuttal, the prosecutor bluntly informed the jury that appellant was a "con artist" who is "trying to con you into his story" (234), or "a con artist ... [who] is trying a scam right here on you in the courtroom" (276). See also 244, again referring to appellant as a "con man." Appellant's account was characterized as a "terrific story, so unbelievable you could hardly come up with anything better" (240) and "simply too much to swallow" (276). The Assistant United States Attorney assured the jury that "Rothwell Reddick was faced with the evidence against him and he has tried to get out of it" (276).

This Court has consistently condemned the attempts of prosecutors to use the prestige of their own position to bolster the testimony of Government witnesses or undercut the testimony of defense witnesses. United States v. Drummond, 481 F.2d 62 (2d Cir. 1973); United States v. LaSorsa, 480 F.2d 522, 526 (2d Cir. 1973); United States v. Puco, 436 F.2d 761, 762 (2d Cir. 1971). Reversible error has been found, where among other improper remarks, the prosecutor characterized the defendant's story as a "'pack of lies,' 'an insult to your intelligence,' and 'a concocted defense.'" United States v. Gonzalez, 488 F.2d 833, 836 (2d Cir. 1973). Similarly, the Court has proscribed a prosecutor's reference to the defense as "preposterous" or an "insult" to the "intelligence" of the jurors. United States v. Drummond, supra, 481 F.2d at 64. Further, the use of personal epithets, such as the repeated references to appellant as a "con man," has been deemed "beneath the dignity of the United States Attorney's office and of the United States as a sovereign." United States v. Fernandez, 480 F.2d 726, 742 n.23 (2d Cir. 1972); United States v. Benter, 457 F.2d 1174, 1177 (2d Cir. 1972), cert. denied, 409 U.S. 842 (1972). As in United States v. Gonzalez, supra, 488 F.2d at 836, "the remarks in question were neither trivial nor few."

The jury was understandably troubled by the case. Appellant has continuously asserted his innocence and generally adhered to the same account from the first time he met Ms. Buttone and Mr. Guischard. His actions in leaving his nickname and his own phone number with Mr. Guischard's neighbors are not those of a

man who knows he possesses a stolen check. The Assistant United States Attorney's many improper remarks may very well have made the difference between acquittal and conviction. Under the facts of this case, where the evidence of guilt is weak, the misconduct of the prosecutor must be deemed plain error. See United States v. DiStefano, 555 F.2d 1094, 1104 (2d Cir. 1977).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the matter remanded for a new trial.

Respectfully submitted,
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October 12, 1977

CERTIFICATE OF SERVICE

October 13 1977

I certify that a copy of this brief [REDACTED] has been mailed to the United States Attorney for the Southern District of New York.

Barry Bassis

